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Yukon Fuel Company

Locations:

- Aniak
- Bethel
- Ft. Yukon
- Galena
- Iliamna
- Kenai
- McGrath
- Nenana
- St. Mary's
- St. Michael
- Yutana Services

May 4, 2004

BY FACSIMILE TRANSMISSION

USCG-2003-14472-41

MARAD-2003-15171-37

Docket Management Facility
U.S. Department of Transportation
Room PL-401, 400 Seventh Street, S.W.
Washington, D.C. 20590-0001

Re: Joint Notice of Proposed Rulemaking (USCG-2003-14472; MARAD-2003-15171)

Dear Ladies & Gentlemen:

We appreciate the opportunity to submit these comments to the above-referenced Joint Notice of Proposed Rulemaking.

Northland Fuel LLC ("Northland Fuel") is the parent company of a leasing company that owns and leases a fleet of approximately 35 vessels engaged in the coastwise trade. Those vessels have been lease financed and documented pursuant to the lease-finance provisions enacted into law by the Coast Guard Authorization Act of 1996 and codified at 46 U.S.C. § 12106(e). As a result, Northland Fuel has a direct, continuing interest in the outcome of the Joint Notice of Proposed Rulemaking ("Joint Notice").

Prior to April 8, 2004, Northland Fuel was part of Northland Holdings, Inc. Northland Fuel is principally engaged in the fuel distribution business in Alaska both on the Alaska road system and along Alaska's rivers and its coast.

Northland Fuel believes that the Coast Guard has been off-track since the beginning of the lease-finance rulemaking process in May 2001. The rulemaking has, from the start, departed significantly from the plain statutory language enacted by Congress. The rulemaking has modified the law to such an extent that there is little in common between the Final Rule published on February 4, 2004 and the law enacted by Congress and signed by the President on October 19, 1996.

The Coast Guard claims that it is upholding "Jones Act principles" in departing from the law as enacted by Congress. This is an inadequate justification. Those "Principles" -- the U.S.-built, U.S. citizen ownership and U.S. citizen operation

requirements -- are either adequately protected by the foreign lease finance law enacted by Congress or expressly waived by that law (the ownership requirement) in favor of the protections in the law. Thus, there is no recognizable "Jones Act principle" to be protected by the Coast Guard in the Final Rule, and the Coast Guard did not identify any such principle.

The Coast Guard's departure from the plain language of the law and from the Jones Act itself cannot be justified on the basis of the legislative history, as has been explained in detail in prior comments submitted to the Coast Guard. As the successor in interest to a portion of Northland Holdings, Inc., Northland Fuel adopts the comments submitted by Northland Holdings on September 4, 2001, January 28, 2002 and October 8, 2002 in Docket Number USCG-2001-8825 and the comments submitted on October 3, 2002 in Docket Number MARAD-2002-12842.

Not only is the statute clear on its face -- and the Coast Guard has not explained to date how it is ambiguous -- but the legislative history, taken as a whole, does not support the Final Rule. Neither the Coast Guard nor any other administrative agency has the authority to choose among sentences in a Conference Report without explaining why one passage is more important than another and ignoring important legislative history events. The Coast Guard's failure, in particular, to mention the amendment sponsored by Senator Ted Stevens and adopted by the U.S. Senate but rejected by the Conference Committee is significant and undermines the Final Rule.

As the Coast Guard moves forward in the present Joint Notice, we urge the Coast Guard to reconsider its approach. We believe that the Coast Guard has already done significant harm to the many persons who relied on the law as enacted by Congress and prior Coast Guard interpretations. At a minimum, the Coast Guard should prevent the further possibility of harm.

The Final Rule acknowledges how far it has diverted from the law and prior precedent by containing a "grandfather" provision. That "grandfather" provision, however, is totally inadequate. It grandfathers vessels only and it is otherwise extremely limited by its terms. For example, if a "grandfathered" vessel suffers a casualty or must be replaced due to age or other reasons, its replacement is not grandfathered under the Final Rule. And companies, such as Northland Fuel, which relied on the law as enacted by Congress and Coast Guard and MARAD approvals, cannot acquire or construct vessels without involuntary restructuring. Thus, the "grandfather" effectively dooms companies that relied on the lease finance law to steady commercial strangulation or to involuntary restructuring.

We therefore urge the Coast Guard to revise the grandfather to encompass entities that relied on the lease finance law prior to February 4, 2004. A grandfather restricted to vessels simply does not take into account the reasonable reliance interest

of companies like Northland that complied with the law and prior Coast Guard interpretations and obtained confirmation of their compliance from the Coast Guard and MARAD.

Reserving our rights to pursue our objections to the "grandfather" as contained in the Final Rule, we are also adamantly opposed to any time limit on the "grandfather" period. Northland Fuel reasonably relied on the plain language of the law and Coast Guard and MARAD interpretations and approvals. That reasonable reliance would be completely frustrated by a limitation on the grandfather period. Three years, in particular, is an arbitrary period of time and bears no relation to the useful life of vessels lease-financed under the law or to reasonable expectations as to the relative certainty of the requirements under the law.

Moreover, the idea that the grandfather should commence retroactively from February 4, 2004, if it is restricted to a time period, is punitive and arbitrary. Having the time period commence from February 4, 2004 also appears designed to make it almost impossible for companies that relied on the law to plan effectively for the future. Based on the track record with the Final Rule, the Coast Guard could easily take more than one year before it publishes its decision whether to limit the grandfather to the proposed three years from February 4, 2004. Thus, sometime during the summer of 2005, companies that reasonably relied on the law may discover that they have about 18 months to restructure -- not the three years the Coast Guard indicates is a reasonable period. Under the circumstances, the narrow "grandfather," coupled with a proposed time limit that commences retroactively, will not permit orderly restructuring.

In this context, we also note for the record that the Coast Guard adopted provisions in the Final Rule that were never published for public comment. The Coast Guard arbitrarily adopted many aspects of these "comments," which were more properly a petition for rulemaking under the Administrative Procedure Act, even though many companies requested the opportunity to submit comments if the proposals were to be considered. The Coast Guard did not afford any person an opportunity to comment on these provisions in a public docket.

Thus, the Coast Guard is now considering restricting a grandfather that applies to a Final Rule that in large measure was never put to the public for comment. This is a fundamentally unfair process that we understand cannot be squared with the Administrative Procedure Act.

No doubt the Coast Guard will hear from a well-rehearsed chorus that the grandfather should be restricted. But a rulemaking is not an "opinion poll." The Coast Guard is required by law to engage in reasoned decision-making -- not adding up the

yeas and the nays -- and a retroactive restriction on the grandfather would simply be neither reasoned nor fair.

It is also noteworthy that the Joint Notice is unclear on whether the grandfather, restricted or not, would protect the reasonable reliance of companies with time charters if the Coast Guard proceeds with its Alternative 2. We urge the Coast Guard to consider carefully how it will defend first promulgating an indefinite grandfather, then proposing a three-year restriction, and then adopting a prohibition on time charters that effectively terminates the grandfather. We respectfully submit that such an outcome would be irrational and arbitrary.

The Coast Guard and MARAD have also proposed restricting or effectively abolishing time charters of lease financed vessels ("Alternative 2"). Neither proposal makes sense. Both proposals ignore the essence of a time charter. A time charter does not transfer control over the operations of a vessel. And the Jones Act does not prevent non-citizens from having access to coastwise-qualified vessels pursuant to time charters. Therefore, to focus attention on time charters is also irrational and arbitrary.

Northland Fuel therefore respectfully requests that neither Coast Guard alternative be adopted and that MARAD not revise its current general approval of time charters. On this score, we again point out that the Coast Guard is ignoring the legislative history. The amendment adopted by the Senate sponsored by Sen. Stevens and rejected in conference would have restricted all agreements between the charterer and the vessel owner, not just time charters. It was rejected by Congress. Yet, the Coast Guard has proposed ignoring that event and reversing the decision of the 104th Congress. Neither the Coast Guard nor any other administrative agency has that authority.

A prohibition on time charters of foreign lease-financed vessels would be particularly inappropriate in the case of Northland Fuel. The time charters in use today were presented to both MARAD and the Coast Guard in early 2000 for review. MARAD, in particular, provided extensive comments. Northland made many changes in response to those comments and both agencies approved the charters and the foreign investment in May 2000. After having done so, it would irrational and fundamentally unfair to force Northland to restructure to eliminate these reviewed and approved time charters.

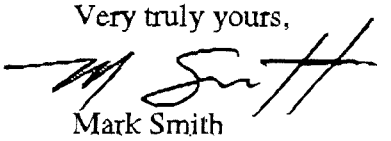
Finally, it has been suggested that applications to document vessels under the lease finance law be made available to the public for comment. The Coast Guard should take into account the fact that the amendment sponsored by Sen. Stevens was accompanied by Senate report language as follows:

> Provisions will also be made so that interested persons can register their concerns with respect to any lease finance transaction which may not be bona fide.

Neither this report language, nor any statutory companion, was adopted by the U.S. Congress.

Thank you for the opportunity to submit these comments.

Very truly yours,



Mark Smith
President